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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No.

RED BALL MOTOR FREIGHT, INC., *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Red Ball Motor Freight, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case (its case No. 17,994) on March 3, 1964.

Citations to Opinions Below

The final order of Respondent, the National Labor Relations Board, is reported at 143 NLRB Reports, No. 32, and is printed in the Appendix hereto. (Trial Examiner's Intermediate Report and Recommended Order at Appx.[1] 1-38; Board's Decision and Order at Appx. 39-40.) The judgment of the United States Court of Appeals for the

[1] The Appendix to this petition is cited herein as "Appx." The Joint Appendix in the Court below is cited herein as "J.A."

District of Columbia Circuit, which is unreported, is also printed in the Appendix hereto. (Appx. 41-42.)

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on March 3, 1964. This petition is filed within ninety days thereafter, as required by Rule 22(1) and computed under Rule 34(1) of this Court. The jurisdiction of this Court is invoked under 28 USC 1254(1).

Question Presented

Whether, in reviewing a decision of the National Labor Relations Board, the United States Court of Appeals for the District of Columbia Circuit has followed the substantial evidence rule as enunciated by this Court in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, and as applied in other Circuits, or whether a conflict has now developed among the Circuits in the interpretation and application of the rule which requires the intervention of this Court in order to assure uniform application of the National Labor Relations Act?

Statutes Involved

Section 7(c), Administrative Procedure Act, 5 U.S.C. § 1006(c):

"Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and *no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such*

portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence.''. (Emphasis added.)

. Sections 7 and 8(a)(1) and (3), National Labor Relations Act, 29 U.S.C. §§ 157, 158(a)(1) and (3):

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." (29 U.S.C. § 157)

"(a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . ." (29 U.S.C. § 158)

Statement

Petitioner, Red Ball Motor Freight, Inc., is an interstate motor carrier of freight. (Appx. 2) A Regional Director of the National Labor Relations Board, acting on charges by three local unions affiliated with the International Brotherhood of Teamsters, issued a complaint against Red Ball alleging that the company had violated Sections 8(a)(1) and (3) of the National Labor Relations Act. (Appx. 1-2) After hearing, the Board's Trial Examiner issued an Intermediate Report and Recommended Order requiring Red Ball to reinstate seven employees. (Appx. 32-36) The Examiner recommended that the charges and complaint as to another employee be dismissed. (R. 33-34)

A three-member panel of the Board adopted the Examiner's report and recommendations *in toto*. (R. 39-40) Thereafter, both the Board and the unions instituted review proceedings in the United States Court of Appeals for the District of Columbia Circuit. The Board sought enforcement of its order, and the unions sought to have the Court set aside the Board's dismissal of the complaint as to the one employee who had not been ordered reinstated. By judgment entered March 3, 1964, the Court below affirmed the Board without issuing any opinion. (R. 41-42)

Of the seven employees involved in this proceeding, the record shows that one was laid off in an economic layoff or reduction in force and that each of the others was terminated for some justifiable reason—two for involvement in accidents (Appx. 16-17; J.A. 207, 213, 45, 47-48) (one of whom actually resigned—Appx. 17; J.A. 363), two for speeding (Appx. 10-13; J.A. 243-44) and two for other serious infractions of the company's rules. (Appx. 23-24, 26-28; J.A. 120, 134, 135, 138, 190, 366) Despite this evidence, the Trial Examiner, whose report was adopted by the Board and affirmed by the Court below, concluded that each of these seven was discharged because of his membership in and support of the Teamsters. (Appx. 32) The Examiner based this conclusion, not on the facts and circumstances surrounding each termination, but on certain "Background" findings. (Appx. 3-5, 10, 12, 18, 22, 25, 26, 28, 29, 31-32, 33) The basic "Background" finding was that Teamster organizational activities had been carried on continuously at Red Ball since 1948. (Appx. 3) (There is, incidentally, no support for this in the record. While the Teamsters did bring charges against Red Ball in 1948 —*NLRB* v. *Red Arrow Freight Lines, Inc.*, 180 F.2d 585 (5 Cir.), cert. denied 340 U.S. 823—the record is barren

of any evidence showing any organizational attempts by the Teamsters at Red Ball between 1948 and 1961.)

Since 1948, Red Ball's employees have been represented by the Union of Transportation Employees (U.T.E.). The U.T.E. is a *bona fide* labor organization (see *Teamsters* v. *Red Arrow Freight Lines*, 213 F. 2d 260 (5 Cir.)), and it is not contended in this proceeding that it was formed or dominated by Red Ball. The Teamsters resumed their efforts at Red Ball in 1961. The Examiner found that Teamster adherents were active (and unsuccessful) in a U.T.E. election in July of that year. Having noted this fact, and having already found (incorrectly) that the Teamsters had been active at Red Ball "for some years", the Examiner went on to make what he characterized as a "reasonable conclusion" that Red Ball knew at the time that the seven employees involved in this proceeding were active in support of the unsuccessful (or pro-Teamster) group in the U.T.E. election in July 1961. (Appx. 3-4) This "reasonable conclusion" is one of the fundamental bases of the Examiner's decision. (It is also unsupported by any evidence, substantial or otherwise.)

On November 30-December 1, 1961 there was a Board-conducted election at Red Ball between the Teamsters and the U.T.E. The Teamsters lost. As further "Background" the Examiner found (again incorrectly) that each of the seven employees involved in this proceeding was a Teamster observer at that election, or was designated to act as such, and that his activity was well know to Red Ball. (Appx. 4) The Board adopted this finding (Appx. 39), and the Court of Appeals (in effect) affirmed it (Appx. 42), despite the conceded fact that Elton Cathey, who is one of the seven, was not a Teamster observer at this election. (J.A. 5-6) (This was conceded in the Charging Party's brief to the Board.)

Based upon his "Background" findings, the Examiner conceived and adopted the theory that the seven employees involved in this case were discharged because of their membership in and support of the Teamsters. (Appx. 33) Red Ball's evidence showed, however, that there was no such pattern or purpose in these discharges. One of the seven was not even a Teamster observer. (J.A. 5-6) Another was not discharged at all but was laid off in an undenied economic layoff. (Appx. 30) The other discharges were all for cause and were the result of a safety campaign which affected all of Red Ball's employees, Teamster opponents as well as Teamster adherents. (See p. 4, *supra*) For example, the record shows that one of the employees discharged during this safety campaign had actually been a U.T.E. observer in the U.T.E.-Teamsters election of November 30-December 1, 1961. (J.A. 6)

During the election campaign which preceded the election of November 30-December 1, 1961, Red Ball made known to its employees that it opposed the Teamsters. There has, however, been no charge or finding that Red Ball in any way violated the National Labor Relations Act during this period. However, the Examiner relied on Red Ball's entirely lawful and proper conduct during this period as another "Background" fact showing hostility toward the union. (Appx. 4)

Based upon these "Background" facts, the Examiner swept aside all evidence showing that these employees were terminated for cause—such as speeding or other violations of company rules—and concluded that they were discharged for union activity. Red Ball contended before the Board and the Court below: (1) the Examiner's conclusion rests upon inferences which are not supported by substantial evidence but only by other inferences, and (2)

he ignored probative evidence which fairly detracted from the weight of his improperly drawn inferences. The Board and the Court of Appeals did not mention Red Ball's contentions but merely followed the Trial Examiner, uncritically and without issuing any explanatory opinion.

Reasons for Granting the Writ

1. In the important case of *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, this Court pointed out that, in reviewing decisions of the National Labor Relations Board, the Courts of Appeals have the duty to consider not only evidence tending to support the Board's findings, but also evidence conflicting with such findings, since a determination as to the substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This Court stated in *Universal Camera* (340 U.S. 490):

> ". . . that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is no less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before the Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the

worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

It is becomingly increasingly obvious that the various Courts of Appeals are interpreting and applying *Universal Camera* in different ways. The conflict among Circuits is clearly discernible, if not always clearly articulated. There is a sharp contrast, for example, between the action of the District of Columbia Circuit in the instant case and that of the First Circuit in *NLRB* v. *Whitelight Products Division*, 298 F. 2d 12, cert. denied 369 U.S. 887. In that case, four employees whom the employer had laid off were ordered reinstated by the Examiner and the Board on the ground that the evidence showed no economic need for the layoff. The First Circuit reversed the Board, although it noted that the Board could thereafter consider whether there were other circumstances which made the layoffs an unfair labor practice. There was considerable evidence that the employer had a great deal of animosity toward the union. The First Circuit stated (298 F. 2d 14):

> "The underlying basis for the trial examiner's decision was his opinion that the plant manager's testimony was wholly unreliable. In large measure we are not unsympathetic with that determination, but we believe that the examiner allowed his not unnatural distaste to get the better of his judgment. This caused him to disregard what seem to us inescapable facts, and to make findings either not supported by the evidence or in some instances contrary thereto."

The same comment could be made about the Examiner's decision in the instant case. Here, the Examiner and the Board permitted their mistaken conclusions as to Red

Ball's history of conflict with the Teamsters to cloud their judgment as to the facts of the employee terminations. This led the Examiner and the Board to overlook or ignore the overwhelming testimony as to serious, significant and repeated violations of the company's rules by the employees involved in this case.

Also instructive for purposes of the instant case is *Whitelight's* treatment of the discharge of an employee named Belden. Belden was the prime mover in the union activity. He also had lied to his employer about his criminal record and about the circumstances of his discharge from the armed services. The Examiner held that Belden's criminal record and deceit were mere pretexts for a discriminatory firing. The Board, to its credit, disagreed. The Court declared that any employer might want to discharge Belden; and it affirmed the Board, saying (298 F. 2d 16):

> "It might seem reasonable to infer that Belden would have been discharged even if no legitimate reason existed. On the other hand it has been held that some valid reasons are so strong as to override any other."

In the instant case, the Examiner, the Board, and the District of Columbia Circuit all refused to recognize and apply this principle. Had they done so, they would necessarily have concluded that the infractions involved in this case —speeding, involvement in accidents, and other serious violations—were so serious that any employer would want to rid himself of these employees. Here, as in *Whitelight*, there were valid reasons for the terminations which were so strong as to override any anti-union bias which might possibly (and mistakenly) be thought to exist.

In the *Whitelight* case, the First Circuit cited and relied on its prior decision in *NLRB* v. *Whitin Machine Works*,

204 F. 2d 883, wherein certain criteria were set forth for determining what constitutes a firing for reasons of union activity. There the First Circuit said (204 F. 2d 884):

> "When a charge is made that by firing an employee the employer had exceeded the lawful limits of his right to manage and discipline, substantial evidence must be adduced to support at least three points. First, it must be shown that the employer knew that the employee was engaging in some activity protected by the Act. Second, it must be shown that the employee was discharged because he had engaged in a protected activity. [Citing cases.] Third, it must be shown that the discharge had the effect of encouraging or discouraging membership in a labor organization."

It is obvious that the criteria set forth in the *Whitin* case were not applied in the instant case and, further, that the Board's proof in the instant case failed to meet those criteria.

Another opinion illustrating the conflict between the District of Columbia Circuit and the other Circuits is *NLRB* v. *Atlanta Coca-Cola Bottling Company*, 296 F. 2d 896, where the Court gave its reasons for refusing to reconsider a prior decision reported at 293 F. 2d 300. In that case, the Fifth Circuit reversed a Board finding that a large number of discharges were for union activity. The Court criticized the Board for a "blanket finding" that all of the discharges were discriminatory and held that all of the evidence on both sides must be weighed in arriving at a determination of whether or not a particular discharg was discriminatory.

Also significant is the Fifth Circuit's decision in *Frosty Morn Meats, Inc.* v. *NLRB*, 296 F. 2d 617, where the plant

manager categorically stated that he was not going to have a union, that he would fire anyone trying to form a union, and that he would close the plant down before accepting a union. One of the employees who had been most active in seeking to form a union was fired for failing to comply with an order to sweep out an area of the plant. The evidence also showed that his work was unsatisfactory in general, that he was slow, uncooperative and dangerous. The Board held that he was actually fired for union activity. The Fifth Circuit reversed, relying heavily on *Universal Camera*, and stating (296 F. 2d 621):

> "If . . . the misdeeds of the employee are so flagrant that he would almost certainly be fired anyway there is no room for discrimination to play a part. The employee will not have been harmed by the employer's union animus, and neither he nor any others will be discouraged from membership in a union, since all will understand that the employee would have been fired anyway. It must be remembered that the statute prohibits discrimination, and that the focus on dominant motivation is only a test to reveal whether discrimination has occurred. Discrimination consists in treating like cases differently. If an employer fires a union sympathizer or organizer, a finding of discrimination rests on the assumption that in the absence of the union activities he would have treated the employee differently.
>
> . . .
>
> "As a speculative matter, it may or may not be true that union animus loomed larger in the employer's motivation than . . . [the employee's] shortcomings as a worker. But when the evidence of just cause for discharge is as great as it is here, the record as a

whole does not support the conclusion that the discharged employee was deprived of any right because of union activities. The power of reinstatement is remedial. It is not punitive. It is not to penalize an employer for anti-unionism by forcing on the pay-roll an employee unfit to stay on the job."

When the instant case is compared to the above-cited cases, it becomes obvious that the District of Columbia Circuit is indeed applying *Universal Camera* in a way different from its sister Circuits. The National Labor Relations Act is national legislation, and it is patently undesirable that it should be applied in a different way in different Circuits. In the instant case, there was an abundance of evidence to establish that one of the terminations was actually an economic layoff and that the others were all for serious infractions of the company's rules. Despite this evidence, and despite the fact that it is conceded that the employer had not engaged in unlawful activity during or prior to the Board-conducted election of November 30-December 1, 1961, the Examiner ruled that these employee terminations were discriminatory. He based this on a mistaken assumption of continuous Red Ball-Teamster conflict going back to 1948. He also based it on the mistaken assumption that all of the terminated employees had been Teamster observers at the election. He assumed a pattern of discharge and ignored the substantial evidence showing that no such pattern existed. Under these circumstances, and given the seriousness of these employees' infractions of company rules, it is apparent the First and Fifth Circuits would have reversed the Board. The District of Columbia Circuit refused to do so, because it is, in effect, following a different rule from that being applied in other circuits. Unlike the First and Fifth Circuits, the District

of Columbia Circuit is apparently following a rule that a finding of discriminatory firing may be based merely upon a supposed showing of anti-union bias, even where there is strong evidence that flagrant misconduct was the cause for the firing.

2. The decision of the Court below in the instant case is also in conflict with the decision of the Sixth Circuit in *Pittsburgh S.S. Co.* v. *NLRB*, 180 F. 2d 731, and with the decision of this Court in *Local No. 1424, International Machinists* v. *NLRB*, 362 U.S. 411. In *Local No. 1424*, this Court ruled that remote evidence cannot be used as a basis for finding present bad faith or evil intent. The Sixth Circuit, in deciding the *Pittsburgh S.S. Co.* case, remanded to it from this Court for the purpose of evaluating its decision in light of the possible impact on that decision of amendments of the Administrative Procedure Act and the Taft-Hartley Act, stated:

> "These statutes were designed to eliminate the wholesale use of hearsay, the drawing of expert inference not based upon evidence, and the consideration of only one part of the case."

This decision was affirmed by this Court, at 340 U.S. 498.

In *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 230, this Court said that

> "... this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force."

Prior to the *Universal Camera* case, *supra*, and the 1947 amendments to the National Labor Relations Act and the enactment of the Administrative Procedure Act, this Court held, in *NLRB* v. *Columbian Enameling & Stamping*

Co., 306 U.S. 292, at page 300, in referring to the substantial evidence rule:

> "Substantial evidence is more that a scintilla, and must do more than create a suspicion of the existence of the fact to be established."

The important principle recognized and applied in the above cases were not applied by the District of Columbia Circuit in the instant case. In this case, the Court of Appeals erroneously permitted the Board to pile inference upon inference and base a finding of discriminatory discharge on mistaken assumptions as to the employer's historical relationships with the union rather than upon the facts and circumstances surrounding each termination. In so doing, the Court relied on remote evidence and ignored substantial evidence showing that the terminations were, in fact, for cause. In so doing the Court also departed from the practice of other Circuits.

Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case No. 23-CA-1435

RED BALL MOTOR FREIGHT, INC.,

and

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 968; DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 745; TRUCK DRIVERS AND HELPERS LOCAL UNION NO. 568, ALL AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.

Jerome L. Avedon, Esq., for the General Counsel.

Charles D. Mathews, Esq., and *Allen P. Schoolfield, Jr., Esq.*, of Dallas, Tex., for the Respondent.

Mullinax, Wills, Morris & Mauzy, of Dallas, Tex. by *David R. Richards, Esq.*, for the Union.

Before: *Horace A. Ruckel*, Trial Examiner.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

Upon an original charge filed on May 26, 1962, and upon amended charges filed on June 18 and July 5, 1962, by General Drivers, Warehousemen and Helpers Local Union No. 968; Dallas General Drivers, Warehousemen and Helpers, Local Union No. 745; Truck Drivers and Helpers Local Union No. 568, all affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein collectively called the Union or the Teamsters, the Regional Director for the Twenty-third

Region of the National Labor Relations Board, herein called the Board, on July 6, 1962, issued his complaint against Red Ball Motor Freight, Inc., herein called Respondent alleging in substance (1) that Respondent has threatened certain of its employees with discharge and physical violence and (2) on various dates discharged or laid off seven employees and refused to reinstate them, because of their activity on behalf of the Union, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (29 U.S.C. Sec. 151, and following), herein called the Act.

On July 13, 1962 Respondent filed its answer in which it denied the commission of any unfair labor practices.

Pursuant to notice the undersigned Trial Examiner conducted a hearing at Houston and Dallas, Texas, on September 10, 12, 13 and 14, and November 13, 14, 15 and 16, 1962, at which the parties were represented by counsel. All parties subsequently filed briefs.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. *The business of Respondent*

Respondent is a Delaware corporation having its principal office and place of business at Dallas, Texas, and operating terminals at Houston, Texas, Shreveport, Louisiana, El Dorado, Arkansas, Denver, Colorado, and other locations in various States of the United States where it is engaged in the business of transporting goods and commodities by motortruck, under license by the Interstate Commerce Commission.

During the 12 months prior to the issuance of the complaint, Respondent, in the course and conduct of its business received in excess of $1,000,000 for the interstate transpertation of goods and commodities.

II. *The labor organizations involved*

General Drivers, Warehousemen and Helpers Local Union No. 968; Dallas General Drivers, Warehousemen and Helpers Local Union No. 745; Truck Drivers and Helpers Local Union No. 568, all affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, are labor organizations within the meaning of Section 2(5) of the Act.

III. *The unfair labor practices*

A. Background

Respondent operates as a common carrier of freight in various States of the United States. Its general office and main terminal are at Dallas, Texas. Altogether it operates 79 terminals in the South and Southwest. This proceeding is limited to events occuring at the Dallas, Shreveport, and Houston locations.

The Union has for some years been attempting to organize Respondent's drivers in the unit of employees presently represented by Union of Transportation Employees, herein called U.T.E., which has a collective-bargaining agreement with Respondent. In 1948 the Board found [1] as a result of charges filed by the Teamsters Union, that several motor carriers, of which Respondent was one, had unlawfully controlled the National Association of Motorized Common Carrier Truck Line Employees, purporting to represent the truckers' employees, and ordered its disestablishment. The Board found that one R. S. Craig was a management representative of Respondent and that Respondent had expressly authorized Craig to form the Association. Sometime following the Board Order disestablishing the Association, U.T.E. was formed, with Craig as its president.

Efforts of the Union to organize Respondent's employees and to displace U.T.E. as their bargaining representative were revived during the latter part of 1960 and the early

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[1] *N.L.R.B. v. Red Arrow Freight Lines, Inc., et al.*, 77 NLRB 859; enforced 180 F. 2d 585, cert. denied 340 U.S. 823.

part of 1961. In July 1961, an election was conducted in U.T.E. in which James Hester ran for the presidency of U.T.E. against Craig. Teamster adherents were active in support of Hester. Hester lost, and on July 26, 1961, was discharged for speeding. It is not alleged in the complaint that this was a discriminatory discharge. Neither is it alleged that Respondent has formed and dominated U.T.E. as it did the previous Association, or that Craig was and is Respondent's instrument for this purpose. It is a reasonable conclusion, however, which I draw in view of the close relationship between the Association, U.T.E., Craig, and respondent, that Respondent who admittedly knew that the employees named in the complaint were active in the Teamsters also were aware that they were leaders of a dissentient group in U.T.E. and supported Hester as against Craig, an activity which in view of the latter's previous services to Respondent, it could not have viewed with favor.

On November 30 and December 1, 1961, on the petition of the Union,[2] the Board conducted an election among Respondent's employees. The Union lost the election. Respondent participated actively in the preelection campaign and directed a series of letters to its employees and their families over the signature of Henry English, chairman of its Board of Directors, and O. B. English, criticizing the Union and contrasting it unfavorably with U.T.E. In addition, a number of Respondent's highest officials convened meetings of employees and addressed them in the same vein. The letters and the speeches were in the familiar *American Tube Bending*[3] pattern, and it is not contended that their utterance was in violation of the Act. The speech was sometimes lurid but at all times free. These activities do show, however, that Respondent is hostile to the Union.

In the preelection campaign all seven of the employees named in the complaint either acted as observers for the Union at the election, or else were designated to do so, and their activity was well known to Respondent. They were

[2] Case No. 16-RC-3016.

[3] *American Tube Bending Company, Inc. and Local 420, International Association of Machinists*, 44 NLRB 121.

terminated during the period from March 27 to May 8. They were: Horace Limbaugh, H. W. Lewis, Elton Cathey, William Clem, Joe Shamblin, Gordon Hodgkins and W. T. Willingham.[4] This was almost, but not quite, all the union observers at the election. One M. A. Butler, is still employed and his name does not appear in the complaint. Another C. C. Fox, who was designated as an observer but did not serve, is still employed. One U.T.E. observer, Robert Shanklin, was discharged in March 1962.

Respondent asserts that these seven employees were legitimately terminated for various categories of offenses, or else voluntarily quit, or were laid off for economic reasons.

B. The discharges

1. *Discharges for speeding*

a. The safety program

In April 1961, Respondent employed John Barr as safety director for the purpose, among others, of tightening up its safety program to reduce the number of accidents. All line (over-the-road) drivers come under his personal supervision for this purpose. City drivers remain under the supervision of the terminal managers. In May, Barr began addressing employees at a series of safety meetings. His credited testimony is that he told the employees that Respondent was tightening up its safety program and warned them against driving within a town or city in excess of the posted speed limit. The Texas speed limit for trucks on the open road, however, is 45 miles per hour, and Barr testified that Respondent has always tolerated a speed up to 50 miles. The employees were never officially informed of this because, according to Barr, if they were told that they were given an inch they might take a mile, or in this case five.[5] It is not disputed that the employees knew of this tolerance and drove accordingly.

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[4] Another, Hall Nichols, is alleged to have been discriminated against by being singled out for warnings and constantly checked upon.

[5] It is also probable that Respondent did not care to sanction in words a violation of State law.

Respondent has three methods of checking speed: (1) by a tachograph attached to every truck which records, along with the speed, the date, how many hours it is driven each trip, and where it stops. The driver drives a different truck every night (2) by transport safety reports which are recordings made by insurance company patrolmen who make on-the-spot checks; and (3) personal following of trucks by Barr or some other safety employee, and use of radar.[6]

The tachograph charts and transport safety reports are used as tools to indicate whether drivers are violating driving regulations. If they indicate drivers, in general, are going too fast, Barr may then decide to follow a truck personally. Tachograph charts accumulate to the number of 7,000 or 8,000 a month from all over the system. They do not cross Barr's desk. They are kept for a month in the Dallas shop under the number of the vehicle, and not under the name of the driver.[7] Barr occasionally spot checks them by taking "a fistfull—at random, just starting through them and looking for violations." As to the transport safety reports, when Barr received one which indicated a violation of some sort he would "at (his) earliest convenience get out there and personally check."

Barr's further testimony on direct is:

> I will never discharge a man on the strength of the transport reports or tachograph charts alone. I won't discharge a man if I go out there and check him and catch him the first time in person. If I get out there and check him personally, visually, myself, and that is the first violation, I will not discharge him. I will give him a warning letter.

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[6] Also, each truckdriver maintains a log which records among other things the number of hours on and off duty and where he stops.

[7] The driver of a particular truck, however, can be ascertained by inquiring of the dispatcher or checking the truck number against the sign-in-and-out register.

On cross-examination Barr amended his testimony:

Q. I think you said before that you will not discharge a man on the basis of a visual infraction on just the first time. Is that right? A. If he has never been warned before.

As I understand Barr's testimony it is that he never discharges for speeding except when there has been a previous reported violation pursuant to which a warning has been given. But this previous reported violation need not have been witnessed by him personally. It may have been a violation appearing on a tachograph chart or a transport report. Given such a report, a subsequent personally observed violation may result in discharge.

As to whether a warning is always given when a violation is reported, Barr testified that he has never overlooked a violation or neglected to issue a warning letter when he "thought one was due." When he did not think one was due, he did not issue it. It was not automatic.

Although Barr's testimony is that Respondent never discharges drivers for speeding on the basis of a tachograph report or a transport safety report, alone, but only on the basis of his personal observation, after a prior warning, he did not testify that these drivers whom he personally caught speeding after a warning were invariably, or even customarily, discharged. They might be or they might not. He testified that there was "no fixed practice." Each case is "based on its own merits." He thus exercised his discretion as he testified he did in issuing warning notices, when he "thought one was due," and as he further did with respect to discharge because of chargeable accidents.[8] Discharge for this reason, he stated, followed no fixed rule.

Since a driver is discharged only after Barr has personally observed him speeding after a prior warning, it becomes important to know what it is which determines him to make a personal observation of the trucks. Again, there is nothing systematic about this. It is manifestly impossible for him to follow every driver whose tachograph

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[8] A chargeable accident is one which, on its face, is the fault of the driver.

reports show he may have been speeding, nor did he have a consistent practice of following drivers who had been given prior warnings.[9] Here again, he followed no fixed rule, and was unable to say even approximately how often he followed trucks or how many he followed. It was done on a random basis:

Q. Now when you check up on city pickup and delivery drivers— A. Yes, sir, sure do.

Q. How often do you do that? A. Well, I don't have any set pattern. Just whenever the time or the opportunity affords itself—

Q. In March 1962, how many observations did you make of city pickup and delivery drivers? A. I don't know, sir.

. . . . . .

Q. How about April, in 1962— A. I can't recall.

. . . . . .

Q. How about May 1962. How many spot checks of city pickup and delivery drivers did you make in that month? A. I made several in Houston that I recall.[10]

Q. Did you make any in any other city in the month of May? A. No sir.

Q. How about June 1962. Did you make spot checks of city pickup and delivery drivers in any of the cities of the Red Ball system? A. In June 1962, I was pretty busy trying to reorientate our people in the Southeast division—

Q. In other words, your answer is no? A. No. That is correct.

Barr's continued testimony is that he made no checks in July and August 1962. He further testified:

Q. How would you determine how you were going to make your check? A. There was no determination.

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[9] He testified that some drivers had four or five warnings for speeding but were not discharged because they had not been caught.

[10] This is the month in which Willingham, a Houston pick up and delivery driver whose discharge is hereinafter discussed, was terminated (May 9).

Q. I mean what caused you to check the drivers that you did check? A. Nothing—

Q. Did you do it on a random basis? A. Yes, sir, it was done on a random basis.

. . . . . .

Q. Did you just cruise around? A. I just cruised around.

. . . . . .

Q. Did you ever say, sit in a place waiting for them to come by? A. Yes, sir.

Q. When was that? A. At the City Dock 18.[11]

Although Barr here is testifying as to how he checked city pick up drivers it is clear from his testimony as a whole that over-the-road drivers were checked on the same hit-or-miss basis.

b. Gordon Hodgkins

Hodgkins started working for Respondent in May 1956, as a line driver based on Dallas. He continued in its employ to May 4, 1962, when he was discharged. Prior to July 17, 1961, he was never warned, reprimanded or disciplined for speeding or for any log violation.

In March 1960, Hodgkins became a line committeeman for the U.T.E. and supported Hester for the presidency of U.T.E. as against Craig. On July 17, 4 days after the election, which Hester lost, Hodgkins was called to Barr's office where Barr told him that he had been checking Hodgkins' tachograph charts and ICC logs for the period of June 16-30 and that Hodgkins had made some improper log entries. Barr proceeded to type a letter stating that any future errors would result in his discharge, and required him to sign it. He also produced a tachograph chart which Barr said showed he had driven up to 55 miles per

[11] As will be seen later, on this occasion Barr waited for Willingham at Dock 18 for an hour and a half while he was unloading, and then followed him.

hour over a stretch in Arkansas. Hodgkins told Barr that the speed limit in Arkansas was 60 miles per hour which Barr, after checking, admitted was correct. Barr thereupon produced another chart which, Barr said, showed sustained speeds of 50 miles per hour on a Texas stretch, with short bursts of speed in excess of 50, and typed up another letter which Hodgkins signed, stating he had been speeding.

Barr testified that he could not recall how many tachograph charts he checked in July 1961, but that there were "several." He could not recall any except those pertaining to Hodgkins, Hester, Eldon Cathey (named in the complaint), and another employee, Mayberry, and I find that this was all. These charts he testified he selected on a spot check basis; he walked down to where the charts were kept and "picked up a handful." He issued warning letters to Hester and Cathey as well as Hodgkins, but not to Mayberry, as to whose chart or log he said he was mistaken in believing it in error.

On July 26, 1961, 9 days later, Respondent discharged Hester for speeding. The discharge of Cathey is hereinafter discussed.

In the fall of 1961, the dissident group in the U.T.E. who had supported Hester became active in the Teamsters' organizing campaign. Hodgkins, along with the six others named in the complaint as dischargees, was an observer in the Board election on November 30-December 1.

In April 1962, Hodgkins was assigned a regular run from Houston to Dallas, generally carrying LTL freight.[12] His usual time of departure was between 9 p.m. and midnight. As a rule Mabra, another driver on the run, left between 7 and 9 p.m. On May 3, about 6:45 p.m., when Hodgkins arrived at the office of the dispatcher, Samons, he heard Samons who was talking on the telephone say, "But Mabra is due out first," and then, "Well, I will get them both out by 8 o'clock some way." Samons did not testify. Barr testified that he did not check the schedules for drivers leaving that night, with Samons, and that he did not talk

[12] Less than truck load.

to Samons on the telephone. Both Mabra and Hodgkins were dispatched at 8 p.m., although Hodgkins had never before left before 9 p.m.

Shortly after midnight when Hodgkins was 500 to 600 yards inside the city limits of Corsicana, Texas, Hodgkins observed a parked car driven by Barr, which started after his truck. Shortly thereafter Hodgkins pulled over to check his tires and Barr, with whom was Lane, Dallas terminal manager, pulled alongside. Barr testified that Lane had never previously accompanied him when checking on drivers. Barr asked Hodgkins if he was familiar with Respondent's rule requiring a driver to bump his tires every 50-75 miles and said he would see Hodgkins when he got back to Dallas. Nothing was said about speeding or being checked by radar. Barr and Lane returned to Dallas to await Hodgkins' arrival without waiting to check any more trucks, although Barr testified that he knew other drivers were due to go through. He did, however, check two trucks which passed before Hodgkins did, and found no speed violation.

Barr, according to his testimony, on his way back to Dallas decided to discharge Hodgkins. He admitted that he did not check his personnel file, which was at the office, before making the decision. If he had done so he would have found that Hodgkins during his 6 years with Respondent received a safety award in every year, and had received only one warning for violating company regulations—that issued the previous July under the circumstances previously described.

When Hodgkins got back to Dallas, Barr discharged him for traveling at 35 miles per hour, or 5 miles per hour as shown by radar, in excess of the posted limit of 30 miles. Hodgkins conceded that he might have been going at this rate when he passed Barr but not afterward, giving as an explanation while testifying that at that point there is a downgrade and he intended to let the truck fall back to 30 miles per hour on the upgrade.

c. W. T. Willingham

Willingham came to work for Respondent in 1954 as a city pickup and delivery driver in Houston. In about September 1961, he was transferred to the job of gasman whose duties were to gas up trailers and back them around the yard up the loading docks. Around the middle of November 1961, he was changed to a city pickup driver.

In the summer of 1961 Willingham became active in signing up members in the Union and later served at the Board election as observer for the Union at the Houston terminal, along with Hall Nichols. It is not disputed that a week or 10 days prior to the election, he had a conversation with Alvie Simpson, Houston assistant terminal manager in which Simpson expressed himself as opposed to the Union. Willingham's interest in it was well known to Respondent.

In March 1962, Willingham along with two others, was given a written warning for exceeding 10 miles per hour in Respondent's yard, in violation of a company rule.

On May 9, Barr, according to his testimony, decided to check some of Respondent's drivers of six-wheel eqnipment as to their driving habits, and ascertained from Foster, Houston terminal manager, in what part of town these trucks might be found, but without obtaining any knowledge as to who the drivers were. Accordingly, he drove to City Dock Number 18, at the waterfront. This was the only time between March and August 1962, when, so far as he could remember, he checked on city pickup and delivery drivers. Between May 7 and 10 he checked on seven or eight.

At dock Number 18, where he arrived about 1:30 p.m., Barr found Willingham's truck being loaded. He remained there for about an hour and a half waiting for it to pull away. When Willingham pulled away Barr followed his truck down McCarthy drive, a four lane street, where he saw Willingham at one point going 45 miles per hour in a 40-mile zone, and then go through a stop light. When Willingham made another stop to load, Barr again waited for him until he had loaded and at 4:23 p.m. followed him

back to the terminal. Altogether Barr spent approximately 3½ hours following Willingham. As a result, he testified, he did not check on any other equipment and left Houston that evening.

At the terminal, Barr, according to his testimony, asked Foster to find out who was driving the truck and Foster called Willingham to the office where Barr played back to him a tape recording which Barr had made while following him. Foster then discharged Willingham.

Conclusions

Respondent urges as to the discharges of Hodgkins and Willingham for speeding that there was no disparate treatment of them. Hodgkins admittedly drove for about a third of a mile within the limits of Corsicana at 5 miles in excess of the posted speed limit, in violation of Respondent's announced policy. Willingham did the same thing within the city limits of Houston, and in addition ran a red light. Both had been previously warned, Hodgkins once, 10 months previously, and Willingham once, on March 28, 1962. Respondent cites the instances of two other employees (Samons and Houston) who speeded on other occasions and who were warned, but not discharged because Barr had not caught them personally. Where, Respondent asks, is there a showing of disparate treatment?

I am not impressed with this argument. All it shows is that since Hodgkins and Willingham were personally observed to be speeding by Barr, and Samons and Houston were not, their discharge was *not inconsistent* with Respondent's stated policy. It is clear from Barr's testimony that both warnings and discharges depended upon all the facts and circumstances, and were not automatic. He used his own judgment. It has also been found that he used his own judgment as to what drivers he should follow.

Hodgkins each year of his employment had received a safety award. He had had but one warning. On the occasion of this warning, which took place during the election in U.T.E. when Hester, with Teamster support, was running against Craig, Barr reached into a reservoir of tachograph discs and reports from seven to eight thousand in number

and drew out "several," which I have found were four.[13] These four were reports on Hester, Hodgkins, Cathey and Mayberry. This, according to Barr, was entirely accidental. Hester, Hodgkins and Cathey were given warnings. Mayberry, whose union affiliation is not revealed by the record was not. Hester, Hodgkins and Cathey were subsequently discharged, the first two assertedly for speeding, and Cathey because of an accident.

On May 3, 1962, Hodgkins was dispatched on his run to Houston from Dallas an hour earlier than he had ever previously been dispatched. Barr lay in wait at Corsicana, radar established, along with Lane, terminal manager, who Barr testified had never previously accompanied him on such an expedition. Barr observed one or two of Respondent's trucks pass by proceeding, according to Barr, within the speed limit. Hodgkins, shortly after midnight, they observed traveling at 5 miles an hour in excess of the speed limit, from the city limits to a point one-third of a mile within the city limits. Although they talked with Hodgkins, they said nothing about speeding, which would seem the natural thing to do since he still had some distance to continue in Corsicana and Barr assertedly was paying particular attention to speeding within the limits of a city.

Having found Hodgkins speeding, Barr and Lane made no further check on other drivers. On the way back to Dallas, Barr admittedly decided to discharge Hodgkins without referring to his personnel file. This would have shown him with only one previous warning, and that 10 months previously, and with a safety award every year of his employment. In the absence of the file and of any testimony by Barr that he personally recalled giving Hodgkins a warning the previous July, I cannot understand how he could have been sure that Hodgkins had received a previous warning, a precondition for discharge. I am unable to believe that the circumstances attending Hodgkins' discharge were purely coincidental.

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[13] While Barr drew out only four on the occasion, he testified as to his general practice that "wherever I get ready to make a spot check, I will just go down and grab a fistful of charts."

So with Willingham. I cannot believe that Barr waited for an hour and a half at the Houston dock until Willingham had loaded his truck and consumed another 2 hours following him throughout the streets of Housing, waiting until he made another pick up and following him back to the terminal, without knowing before he set out, or discovering along the way, that the truck he was following was driven by Willingham. As previously found, Barr could not remember any other instance where he waited an hour and a half for a parked truck to load so that he could follow it.

Here, as in the case of Hodgkins, Respondent's practice did not require that it discharge Willingham who had only one prior warning, and that for driving too fast on Respondent's property,[14] but only that all the circumstances be considered. Both Hodgkins and Willingham, along with the employees those termination is hereinafter considered, had one factor in common. They were known to be active in the interests of the Union, and had served (Hodgkins and Willingham, among others) or been designated to serve as observers for the Union at the Board election. Respondent's opposition to the Union and its support of the U.T.E. was made unmistakably clear to the employees in speeches and letters.

Respondent's records show that from the beginning of 1962 to May 9, the date of Willingham's discharge, Hodgkins and Willingham, both Teamster supporters and election observers, were the only drivers in Respondent's entire system who were discharged for traffic violations, in spite of the fact that there were more than twice as many supporters of the U.T.E. as there were supporters of the Teamsters.[15]

I conclude and find that Hodgkins and Willingham were not discharged because of speeding violations, but because of their activities on behalf of the Union.

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[14] It is not contended that this was a violation of law, but of Respondent's own rule.

[15] On the basis of the results of the Board election, where out of 627 ballots cast, 435 were cast for the U.T.E. (69%) and 192 for the Teamsters (31%).

2. Discharges for accidents

a. Horace Limbaugh

Limbaugh was employed in August 1957, on the Dallas dock. In 1958 he was transferred to making pickup and delevery runs. In the latter part of 1961, after the U.T.E. election, he became active in the Union's organizing campaign and signed up more than 50 drivers. In October 1961, he was called to the office of Meeks, then terminal manager, where Hitt, a foreman, was present, and Meeks asked Limbaugh, according to the latter's credited testimony, if he was for the Teamsters, stating, however, that he was already aware of it because he had seen men standing around his car at night signing up for the Union. Two days before the election Meeks again asked Limbaugh if he was for the Union and Limbaugh said that he was. Meeks was not called as a witness and Hitt did not testify on the point. As has been stated, Limbaugh along with the others named in the complaint served as an observer at the election. His activity in the Union was well known to Respondent.

On Friday, March 23, 1962, Limbaugh while on a Dallas city run backed into a boy on a bicycle when he was straightening out his truck preparatory to unloading. The boy was not hurt but the front wheel was damaged and Respondent subsequently paid $8.49 to have it repaired. Limbaugh's credited testimony is that the bicycle came up under the rear of the truck so that it could not be seen through the rear-view mirrer. Limbaugh telephoned in a report to Haslet, the dispatcher, who told him to finish his run. That evening Haslet told him to make out an accident report on Monday. On Monday morning Limbaugh forgot to make out his report before leaving on his run. When he got back that evening he found his timecard pulled and when he asked Lane, terminal manager, about it, Lane told Limbaugh to see him the next morning. On the following morning he did so. Lane called Limbaugh's attention to several backing accidents he had had in previous years,

stated they were too many, and told Limbaugh that he was suspended during investigation.[16]

Limbaugh's testimony is that he then asked Lane how long he would be suspended and Lane said that it was up to the general office, Limbaugh said that Charles Fisk, Respondent's vice president in charge of operations, was "after him" and that he was being suspended because of his Teamster activity. Lane said he knew nothing about this. Limbaugh then asked if he could work elsewhere during his suspension because of his family and the family bills, and Lane told him it was against company policy to work for another employer while working for Respondent. Limbaugh testified that Lane then suggested that he resign. Lane's testimony is that this was the suggestion of Limbaugh who said "I think I will just resign." I accept Limbaugh's version as the true one. Lane proceeded to type up a letter of resignation and Lane, according to Limbaugh, said, "Well, just go ahead and sign this letter." According to Lane he asked Limbaugh if that is what he wanted to do. Limbaugh signed, stating that he hated to lose all his seniority at Red Ball.

Conclusions

Respondent contends that Limbaugh's termination was by way of resignation. The General Counsel contends it was a constructive discharge. I agree. Lane's refusal to give Limbaugh any idea of how long his suspension might be, when he knew that it probably would take no more than 24 hours, coupled with his refusal to permit him to work elsewhere while suspended and his failure to tell him that an employee was paid during such a suspension, was designed in my opinion to force Limbaugh's resignation. I find significant Lane's further testimony that he had decided not to suspend Limbaugh at all, but to issue him a warning letter instead, but did not have a chance to tell him

[16] This is Respondent's usual procedure. Ordinarily an employee is paid during an investigatory suspension, which normally is completed within 24 hours. If he is suspended after investigation, this is a disciplinary suspension and he is not paid while it is in effect. I find that Limbaugh had no knowledge of the exact procedure.

so because Limbaugh "at that point" began to claim that the general office was "out to get him." I see no reason why Lane could not have told Limbaugh at this point or some other. His failure to do so I find was occasioned by his intention to force his quitting. Lane could not reasonably have believed that Limbaugh was voluntarily resigning, since Limbaugh was protesting that the general office wanted to get rid of him, that he had family obligations, and that he hated to lose the seniority gained in Respondent's employ. I find that Lane's entire course of action was calculated to bring about Limbaugh's quitting, and that by so bringing it about Respondent constructively discharged him. I find that the reason for the discharge, or forced quitting, was Limbaugh's known activity on behalf of the Union to which Respondent was openly opposed.

b. Elton Cathey

Cathey came to work in September 1959, as a line driver based on Dallas. In 1961 he became active in the Teamsters' organizing drive and procured about 75 Teamster cards. It has already been found that he served as an observer for the Union at the Board election. It has also been found that at the time of the U.T.E. election one of Cathey's tachograph charts, along with charts pertaining to Hester, Hodgkins and Mayberry, was pulled "at random" from among seven to eight thousand charts, and Hester, Hodgkins and Cathey, but not Mayberry, were issued warnings for speeding.

On April 1, 1962, Cathey left Dallas on a run to El Dorado, Arkansas, via Shreveport, Arkansas. Before leaving Dallas he checked the lights, tires, wheels and fire extinguisher, and checked his tires again at Wills Point and Longview, Texas. At Shreveport he dropped his trailer and picked up another, and again checked his tires. About 70-75 miles past Shreveport, the dual outer drive wheels on the right side of the tractor suddenly came off, one of them rolling off the highway into a parked car, damaging it to the amount of approximately $600. Cathey was able to hold the tractor and trailer on the road and bring it to a

stop. He called Nethercutt, Shreveport terminal manager, who sent another tractor to haul the trailer to El Dorado. On the following day he was dispatched on a regular run to Dallas where, on April 5, Barr called him to his office.

Barr asked Cathey about the accident on April 1, and Cathey gave him an account of it. Barr showed him a bulletin issued to drivers and said that it required drivers to check their wheels and lugs every 75 miles. Cathey denied that the bulletin said anything about wheels or lugs, and the bulletin itself, in evidence supports Cathey. It is entitled "Tire Fires" and deals solely with their prevention and with methods of fighting them, principally by keeping them properly inflated, and asks for the "cooperation of all of our line drivers in checking their tires prior to departure and every 50 to 75 miles while enroute between terminals."

After reading the bulletin to Cathey, Barr asked him how long he had driven the trailer on his April 1 trip without checking it. Cathey's testimony is that he checked his tires when he picked up the trailer at Shreveport, and so told Barr. Barr's testimony is that he asked Cathey if he had checked his wheels and tires before leaving Shreveport and that Cathey replied that he had not, stating "I just guess I goofed."

Barr's further testimony is: "I told him I would have to think about it for a little while. And I thought it over." But not for long, for then Barr asked Cathey to resign and when he refused told him he was discharged. Barr's further testimony is that he offered to call the U.T.E. representative but Cathey said that would do him no good, and left, and that he did not see Cathey again until the hearing. After that he had left, Barr says that he called House, U.T.E. representative, and told him what had occurred.

Cathey's testimony, however, is that after he left Barr's office he went to the dispatcher's office where he called House on the telephone and asked him to come down. Then Barr passed the door to the dispatcher's office and summoned Cathey over to the main office where he gave Cathey his final paycheck. At about that time House arrived. Cathey told him he was discharged and House suggested that they go in to Barr and see if anything could be done.

In Barr's office House asked Barr to reconsider the discharge and Barr said, still according to Cathey's testimony, "Well, he's done admitted it," and Cathey said, "Wait, I ain't admitted anything." Cathey's testimony is that he then repeated his account of this accident to House and Barr together and asked Barr why, if he was such a bad risk, he had been dispatched, following the accident on his trip to Dallas and that Barr replied that he was waiting until he got to Dallas. Cathey then said, "In other words, you knew you were going to fire me when you talked to those people," and, "If I hadn't gotten around to Dallas I might have had another day or two's work," to which Barr said, "That is right . . . I was going to fire you when you got into Dallas whether it was Thursday or Wednesday morning," and concluded, "This case is closed as far as I'm concerned." House then left and Cathey went with him.

I have related this testimony, circumstantially given, at some length since Barr's account is silent as to any conversation between himself, Cathey, and House, who was not called as a witness. Barr's testimony, as I have found, is that after Cathey had left his office when told he was discharged he did not see Cathey again until the hearing. I credit Cathey's testimony as to the conversation between him, Barr and House, and I conclude that Barr's memory was faulty. For this reason, among others, I do not credit Barr's testimony that Cathey told him that he had not checked his tires *at Shreveport*, and instead I credit Cathey's testimony that what he told Barr was that he had not checked them *after leaving* Shreveport. I have accepted Cathey's testimony that he did check them at Shreveport.

Cathey's testimony as to what was said after House was called in is of further importance in that Barr admitted to Cathey that he had decided to discharge him before he had talked with him. Hence the discharge would not have been affected by any statement by Cathey, even had it been made, that he had not checked his tires at Shreveport. Moreover, it contradicts Barr's statement on the stand that he decided to discharge Cathey during his interview on April 5.

Barr may, however, have believed that Cathey had not

inspected his tires because, had he done so, the accident would not have happened. Sanders, shop foreman, testified that the holes in the wheels into which the studs fitted were elongated to twice their normal size, which indicated to him that the wheels had wobbled because the nuts were loose, permitting the wheels to have free movement against the studs, and that one can see when the nuts are loose on the bolts by looking at the wheels. Cathey's testimony was that the nuts in question cannot be seen by looking at the outside of the outer wheels, but only when the outer wheels are first removed.

Respondent insists that even if these nuts cannot be seen if they are loose the wobbling of the wheels can be felt by an experienced driver, and contends that if Cathey had checked his tires at Shreveport he would have seen that the nuts were loose.

Conclusions

Cathey was not discharged by Respondent for having an accident but, according to its brief, for the "sole and simple reason that he had neglected to check his equipment." I have found that he did inspect his tires before leaving Dallas, twice again before arriving at Shreveport, and again before leaving Shreveport. The accident in question occurred less than 75 miles after leaving Shreveport, within the distance allowed by the "Tire Fire" bulletin. The bulletin itself does not set forth a company rule. It only "asks for the cooperation" of the drivers. It pertains to tires only, which can be seen, and requires that they be properly inflated.

It has nothing to do with inspection of the wheels themselves to discover mechanical faults. This is the responsibility of the service department. Nor am I convinced that loose nuts on the type of equipment in question can be seen when the tires are looked at, or that vibration of the tractor is necessarily caused by loose nuts or that it can be felt by the driver.

The record shows that Barr had determined to discharge Cathey before he talked to him. In my opinion this decision was not based upon the accident on April 1, but upon

Cathey's extensive and well known activity in behalf of the Union, and I so find.

3. Terminations for other causes

a. Joe Shamblin

Shamblin started work in April 1957 as a pickup and delivery driver in Dallas. He was a committeeman for the U.T.E. in 1958, and a councilman in 1959. In 1960 he was appointed treasurer of U.T.E. by Craig, and in 1961 he was elected to that office. In October of that year he sent a letter to Craig, with a copy to Respondent, protesting the way in which the U.T.E. was being run. On October 15 he was expelled by the U.T.E. Thereafter he became active in the Union and was designated union steward at the Dallas dock, and later an observer at the Board election. A short while before the election Fisk, Respondent's vice president in charge of operations, spoke to a meeting of employees at which he praised the U.T.E. and attacked the Teamsters. Shamblin's testimony, admitted by Fisk to be correct in substance, is that he arose and took exceptions to certain of Fisk's statements. After the meeting Fisk detained him and told him that he could not understand what was wrong with him and Shamblin answered that his "problem" was with the U.T.E. and the working conditions. Fisk suggested that if Shamblin wanted the Teamsters he would help him get transferred to the Denver division where Respondent had a contract with that union. Shamblin declined the offer, stating that he would stay in Dallas and work under a Teamster contract there.

On March 28, the day following Limbaugh's discharge, discussed above, Shamblin and several other employees were talking about the discharge in the yard when Fisk and Lane approached and asked what was going on. When Shamblin said they were talking about his pickup truck, Fisk admittedly said, "Don't kid me, Joe. You're out here with that Teamster trouble-making business," and asked Shamblin what was wrong. Shamblin replied that the drivers were dissatisfied with the working conditions and did not like Limbaugh's being discharged. As Fisk and

Shamblin walked away Fisk again suggested that Shamblin quit, and Shamblin again declined, adding that it was like a dictatorship at Red Ball and that it should move to Cuba. On April 6, during a conversation in Lane's office, Lane criticized Shamblin for making remarks about Henry English, Respondent's principal owner, and told him he was causing trouble among the drivers and that the U.T.E., not Shamblin, represented them, Shamblin accused English of being "part of a fake union." Lane suggested that Shamblin quit, told him that there would have to be a change in his attitude, and instructed him to leave the premises when he got off work at the end of the day.

Later in April Shamblin was switched from his job, principally that of picking up and delivering straight loads of freight, and made a "hot shot" driver handling LTL [17] shipments. This involved the handling of smaller and more varied consignments. Shamblin had previously bid on this job and the transfer is not alleged to have been discriminatory. On April 25 Shamblin made his last pickup of the day at Western Electric Company warehouse, just before the closing hour of 4:30 p.m. This consisted of between 12 and 20 different shipments of 200 or more cartons. When the shipments had been loaded Shamblin found that a shipment to Port Arthur was missing. Shamblin was told that the warehouse was closing and to take the load to Red Ball's dock and if it was found to be a shipment short to pick it up on his run the next morning. The next morning the missing shipment, comprising 15 cartons, was found placed to one side in the Western Electric warehouse. Shamblin called Hitt, Respondent's break-out foreman, to see if this shipment checked with the bill of lading and Hitt told him to bring it in, which he did. Shamblin heard nothing more about this until his discharge on May 2.

On May 1 Shamblin had a pickup at White's Auto Store warehouse involving 8 to 15 separate shipments of 300 to 400 cartons. Although Shamblin receipted for all the merchandise he did not receive six tires and a sign.

The 15 carton Western Electric shipment of April 25

[17] Less than truck load.

came to Lane's attention through a spot check of OS & D [18] reports on May 1. Lane testified that this lapse of time was due to the fact that there were 80 to 100 OS & D reports each day, and that usually such reports came to his attention through tracing of a shipment from the destination station after a failure by the consignee to receive it. Lane called Shamblin and criticized him with respect to the shipment, and Shamblin explained the circumstances. Lane said that Shamblin was "making trouble on the dock" and again suggested that he resign. On the following day, May 2, Lane prepared a letter to Shamblin reprimanding him on account of the Western Electric shipment and his attitude toward Respondent, and warning him that if he did not improve he would face discharge.

After its preparation, but before its delivery, the White Auto Supply incident came to Lane's attention. Lane called Shamblin in, told him he had just found out about the White matter, and discharged him. Simultaneously with telling Shamblin he was discharged Lane handed him the warning letter which he had prepared. Lane testified that during his 6 months at Dallas Shamblin was the only driver whom he discharged for failing to pick up or deliver merchandise. The record does not show that any other driver was ever discharged for this reason.

Conclusions

In my opinion Respondent's complaint as to the 15 cartons at Western Electric approaches the trivial. The absence of the cartons was discovered by Shamblin himself, Respondent knew wh they were, and no tracing was necessary though Lane testified that usually such shortages were discovered only after a consignee's failure to receive and subsequent tracing. The White incident is of little higher stature. The absence of the six tires and sign was not discovered by Shamblin but by a trace, and a special run was necessary to get the articles delivered the same day. Shamblin, however, had been only a few days on this

[18] Over, short, or damaged.

run and was unused to handling large numbers of individual items in numerous shipments. Neither matter involved any actual loss to Respondent. Shamblin testified credibly that he himself had on at least six occasions picked up shipments overlooked by other drivers. Lane's own testimony is that there are 80 to 100 OS & D reports each day at the Dallas terminal alone, and that of these 40 to 50 are shortages, a number of them due to the failure of drivers to pick up shipments.

Shamblin, as a councilman, committeeman, and treasurer of U.T.E. had been in open opposition to Craig's administration of that organization, and Respondent knew it. When the U.T.E. expelled him he became active in the Teamsters organizing drive, possibly its most active proponent. He repeatedly made clear to Respondent's officials his dissatisfaction with working conditions at Red Ball and its relationship to the U.T.E., and they made equally clear to him their dissatisfaction with his Teamster activities and their desire to be rid of him. First, Respondent attempted to persuade him to transfer to Denver where he would be under a Teamster contract and removed from the employees he was attempting to organize. This failing, they urged him unsuccessfully and on repeated occasions to quit his employment. Finally they discharged him. Respondent's eagerness to be rid of Shamblin is illustrated by the fact that Lane did not wait for his warning letter to take effect, but discharged him simultaneously with delivering it, on the pretext afforded by the White shipment. He was the only pickup and delivery driver Lane discharged in the Dallas terminal while he was terminal manager,[19] and there is no evidence that anyone else in the entire system was ever terminated for this reason. I find that Shamblin's discharge was caused by Respondent's opposition to the Union and Shamblin's activities in its behalf.

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[19] If respondent had been genuinely concerned by Shamblin's performance it could have transferred him back to his previous run.

b. Henry Lewis

Lewis was employed in January 1957, and worked on the Dallas dock. In 1959 he was transferred to Shreveport, Louisiana, where he was an over-the-road driver. He became active in the Teamsters in late 1960, and obtained signatures of drivers to Teamster petitions. On May 2, 1961, he was called to the office of Scruggs, central dispatcher, and in Barr's presence told about a trailer which he had dropped on a gravel lot at Greenville, Texas, without putting a dollie under it to prevent its sinking into the ground. It is not asserted that it did sink. Scruggs used the occasion to say that Lewis had been seen causing trouble among the drivers and had been telling them they had "run arounds" [20] coming to them. Scruggs testified that a number of unjustified complaints had come to him of "run arounds" and he had traced their source to Lewis. Scruggs then composed a letter to Lewis placing him on probation for a year "to the extent that any further act of negligence or indication of poor judgment on your part will result in your immediate dismissal."

In January 1962, Lewis made a run from Shreveport to Sherman, Texas, via Paris. While in Paris, Lewis saw a shipment of school supplies destined for Sherman which he had not been instructed at Shreveport to pick up, and asked the dock foreman if he should put the supplies in his trailer. The foreman told him not to do so, that another driver had been dispatched to pick them up. When he got to Sherman, Alred, Respondent's agent there, asked him if he had the supplies and Lewis told him that he had been instructed by the dock foreman at Paris not to take them in his trailer. Alred called Scruggs who told him to have Lewis either to go back to Sherman and pick up the shipment, without pay, or to catch the bus and go home. Lewis made the trip to Paris and brought the supplies to Sherman. When he got back to Shreveport, Lane told him that he was careless in not picking up the supplies at Paris, and that he did not

[20] A run around is dispatching a man out of order, instead of "first in, first out."

use his judgment, although it was as much the fault of the dock foreman as it was his. Nevertheless, he prepared a statement which he said Lewis did not have to sign "but if you don't sign this, this is it." Lewis signed. The statement is as follows:

> My duties as a line driver—specifically my responsibility is moving freight from local stops or warehouse on my specific run [illegible]. It was pointed out that any future poor judgment in failing to move local freight or any poor judgment reflecting negligence in performing my duties would be followed by my immediate discharge from the service of the company. Specific references is made to my trip of 1/11/62 through Paris, Texas, where I failed to use judgment in moving freight from Paris to Sherman, Texas.

Lane did not testify as to this conversation with Lewis. I construe his statement that if Lane did not sign the statement "this is it," to mean, as Lewis himself understood it, that he would be discharged.

On Sunday, March 11, 1962, Lewis was dispatched to pick up a load of rolls of paper at Ludlow Plastics in Homer, Louisiana. The load consisted of 30 rolls weighing 39,364 pounds. Lewis' uncontroverted testimony is that he and two employees of Ludlow rolled about 15 rolls on the trailer when it was found they would not fit, so the rolls were rolled off and a forklift truck was used to set them up in the trailer. Lewis helped roll the paper on and off the truck. Whether he helped with the forklift truck is not clear. On his log Lewis showed the pickup of the 39,364 pounds, and a claim for tonnage pay at 2½ cents per hour. Since no dock foreman or dispatcher was present at Ludlow, he had his log initialed (H. B.) by another driver. Several days after Lewis submitted his log for examination and payment, he received a letter from Dale Scruggs, director of transportation, asking if he had actually helped load the paper, and who approved the tonnage figure, since he did not know who H. B. was. Lewis replied on the face of the letter that he had in fact helped load, and returned the letter to Prince, Shreveport dock foreman, who forwarded

it to Lane. Prince wrote on the bottom of the letter that he had approved Lewis' claim on a tonnage basis. He based his approval on Lewis' statement that he helped load.

Lewis was never paid for helping load on either a tonnage or hourly basis. It is agreed that payment on a tonnage basis would have been $1.88 more than on an hourly basis.

On March 27 Scruggs called Lewis to Dallas at Lewis' own expense and on March 28 talked with him. He accused Lewis of not having helped to load the trailer and stated that he had a letter from Ludlow to that effect. He did not produce it. Nor was it produced at the hearing. Alternately, Scruggs said that Lewis' claim should have been on an hourly basis. Scruggs characterized the claim as dishonest, gave Lewis a chance to resign, and when he refused to do so discharged him. On the following day Scruggs wrote Lewis stating he had been discharged because "subsequent investigation" revealed he had not assisted in the loading, and because he had been put on probation for a year on May 1, 1961, and warned in January 1962.

Conclusion

Respondent's whole course of conduct toward Lewis convinces me, and I find, that it discharged him on May 28, 1962, because of his activity on behalf of the Teamsters and not, as it claims, for legitimate business reasons. In pursuit of this aim and purpose it first made the probationary conditions (any further act of negligence or indication of poor judgment), such that no employee could reasonably be expected to meet them since they were undefined, and in the background context included not placing a dollie under a truck, and not talking to fellow drivers. The only other instance of asserted negligence or poor judgment prior to the Ludlow plant loading was his not taking the school supplies from Paris to Sherman. It is uncontroverted that Lewis himself asked the dock foreman at Paris if he should do so, and was instructed that he should not, and that another driver was scheduled to do so. I am at a loss to understand how this can be said to constitute negligence or

poor judgment, or what Lewis could conceivably have done short of defying supervisory authority and disrupting Respondent's transportation schedules. Since Lane did not testify on the point I am without the benefit of his opinion. But he did admit to Lewis, an admission which I regard as something of an understatement, that the dock foreman was partly at fault. It does not appear, however, that the dock foreman was in any way reprimanded. Instead, Lane caused Lewis to sign a self-incriminating statement under what was in effect a threat of discharge in an endeavor, as I view it, to prepare a case against him. He was made to confess, specifically, that he used poor judgment at Paris, and to acknowledge that a similar lack of judgment in the future would cause his discharge.

The future was not long coming. On March 28 Lewis reported that he had loaded freight at the Ludlow dock and claimed pay on a tonnage rather than on an hourly basis. The difference was $1.88 in his favor. This does not seem to have been the complaint against him, however, but rather that he did not help in the loading. This is the basis on which Lane put the matter in the discharge letter. Lewis testified that he did help load, and there is no evidence to the contrary, though other witnesses were available in the persons of Ludlow's dock employees. Lane asserted that he had a letter to that effect, but did not offer to show it to Lewis. Nor did Respondent produce it at the hearing, or make any showing that it was not available.

I conclude and find that Respondent discharged Lewis not for legitimate business reasons but because of his activity in behalf of the Teamsters.

c. William Clem

Clem started to work as a mechanic third class in the trailer shop under Harold Odum, maintenance supervisor. In the fall of 1961 he became active in signing up employees for the Teamsters. Together with Hodgkins and Shamblin he acted as a union observer at the election. He testified that after the election he received less overtime than formerly. I do not find this substantiated by the record.

Clem testified that the day following the election when he was sitting with Olswaski, trailer shop foreman, and several other employees in the coffee shop, Olswaski addressed him as a "no-good-so-and-so-Teamster" and that the Teamsters "ought to be whipped or shot," and said that the Company felt the same way about it and that Odum and Fisk were going to get rid of Clem. Olswaski and others named by Clem as present on this occasion, testified that Olswaski said nothing at all to Clem about the Teamsters. I credit their testimony. On December 5, Clem resigned his membership in the U.T.E.

In January Clem was called to Odum's office and criticized for creating dissension and spreading rumors to the effect that newly hired employees were being given higher classifications than others already employed. Monday, a driver who was concerned about the rumors, was present.

Several weeks later, Clem testified, he was again called to the office where Odum, in Moudy's presence, again accused Clem of stirring up trouble, and called someone on the phone to whom he said "yes, sir," and "no, sir," and told this person that he was discharging Clem. On turning from the telephone he told Clem that he was giving him another chance. This conversation was denied by Odum. Moudy testified that he had been present on only one occasion where Clem was present that previously related. I accept Odum's testimony and that of Moudy as in accord with the facts.

On February 5, Odum offered Clem a job in Respondent's Denver terminal, but he refused it.

In mid-April Respondent laid off six employees in the shop, including Clem. It is not contended by the General Counsel that the decision to lay off was other than economically motivated. When Odum told the group of employees that they were being laid off Clem, according to his testimony, raised the question of bumping to another job and said that he was going to bump, and Odum said he could not bump because he was not a member of the U.T.E. The testimony of Odum and the others present was that the question of bumping was raised by Moudy, or some other employee, but not by Clem, and that Odum said that

anyone who had the right to bump could do so. According to these witnesses it was Clem who announced that the others had the right to bump, but that he did not because he was not a member of U.T.E. I accept their account of the conversation as accurate, and find that Odum did not say that Clem could not bump.

The fact is that the U.T.E. contract gives the right to bump when seniority is sufficient. It is conceded that Clem was eligible to bump, along with one other employee, if he had demanded it. The other eligible employee did not want to bump. It is also clear that Odum knew of Clem's right, but that Clem did not. Odum's testimony was as follows:

Q. Who brought up the subject of bumping? A. Clem.

. . . . . .

Q. What was Clem's statement? A. He didn't have a bump coming because he did not belong to the U.T.E.

Q. Did you say anything when Mr. Clem made the statement. A. No, sir.

Q. Was Mr. Clem's statement a true statement? A. No, sir.

Conclusions

The question presented is whether Odum's admitted failure to tell Clem that he could bump to another job when he knew that Clem was under the mistaken belief that he could not, was motivated by Clem's known activity in behalf of the Teamster's and Respondent's hostility to it. On a previous occasion Odum had tried to persuade Clem to transfer to Denver, and he had refused. His failure to bump had the same result that a transfer to Denver would have had: it removed him from the union activities in Respondent's Dallas shop. If Clem had not been an advocate of the Teamsters, Respondent's antipathy to which is amply demonstrated, among other things, by its termination of six other of its most active proponents, would Odum have interposed to advise Clem of his right to bump when it was obvious that he was ignorant of this right? The answer is not without difficulty, but I believe that it must be in the

affirmative. Ordinary fair dealing between employer and employee would have dictated it. Here this fair dealing was withheld, in my opinion, because of Clem's union activity, and I so find. His termination constituted a constructive discharge.

Concluding Findings

I find that Gordon Hodgkins, W. T. Willingham, Horace Limbaugh, Elton Cathey, Joe Shamblin, Henry Lewis, and William Clem were discharged by Respondent in violation of Section 8(a)(3) and (1) of the Act.

c. Alleged harassing

The complaint alleges that Respondent discriminated against driver Hall Nichols in violation of Section 8(a)(3) and (1) of the Act by, since December 2, 1961, singling him out for special checks and issuing warning notices for alleged violation of rules.

Nichols has worked since 1956 as a line driver out of the Houston Terminal. In 1960 he joined the Teamsters, became active in its affairs, and was an observer at the Board election. This was known to Respondent.

On a run between Houston and Paris, in March 1962, Barr followed his trailer for about an hour and a half. Again on May 8, 1962, Barr followed Nichols while he was driving between 40 and 50 miles per hour on a freeway within the city limits of Dallas where the posted speed limit was 50 miles per hour. When Nichols got back to the Houston Terminal, Barr told Nichols that he would not tolerate speeding in cities, and on the following day gave him two warning notices, one for failure to follow instructions and the other for speeding. The first was based upon Barr's injunction at a safety meeting a day or so before, against exceeding the speed limit within a city. Hence Barr considering this a flagrant violation, warranting two notices. Respondent insists that the State speed limit for trucks is 45 miles per hour, and that this also applies to trucks within a city, even when the posted speed limit is 50 and says nothing about trucks. Barr testified elsewhere, however,

that he had told drivers to follow the posted speed limit in towns. There is no explanation for this contradiction.

I do not find, however, that Respondent harassed Nichols by following him twice within a 3-month period, and on one occasion giving him two notices instead of the usual one. This allegation of the complaint is hereinafter dismissed.

IV. *The effect of the unfair labor practices upon commerce*

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. *The remedy*

Having found that Respondent has engaged in the unfair labor practices set forth above, I recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act. Respondent having discharged Horace Limbaugh, Henry Lewis, Elton Cathey, William Clem, Joe Shamblin, Gordon Hodgkins and W. T. Willingham because of their membership in and support of the Teamsters, I recommend that Respondent offer them immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges and make them whole for any loss of pay they may have suffered by reason of Respondent's discrimination against them, by payment of a sum of money equal to that which they normally would have earned as wages from the date of their discharge to such date as Respondent shall offer them reinstatement, less their net earnings during said period. Such said backpay shall be computed on a quarterly basis in the manner established by the Board in the *F. W. Woolworth Company*, 90 NLRB 289, 291-294, and with interest thereon, at the rate of 6 percent per annum as pre-

scribed by the Board in *Isis Plumbing & Heating*, 138 NLRB No. 97.

As the unfair labor practices committed by Respondent are of a type which strike at the very roots of employee rights safeguarded by the Act, I shall recommend that Respondent be ordered to cease and desist from infringing in any manner upon the rights guaranteed in Section 7 of the Act.

Conclusions of Law

1. The Union is a labor organization within the meaning of the Act.
2. Red Ball Motor Freight, Inc., is engaged in commerce within the meaning of the Act.
3. By discriminating with respect to the hire and tenure of employees, thereby discouraging membership in the Union, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and 8(a)(1) of the Act, thereby violating Section 7 of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
5. The Respondent has not violated Section 8(a)(3) and (1) of the Act by discriminating against Hall Nichols.

Recommended Order [21]

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this case, it is recommended [22] that Respondent, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in and activities on behalf of the Union or any other labor organization of its em-

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[21] In the event that this Recommended Order be adopted by the Board, the word "Order" shall be deemed substituted for the word "Recommended Order."

[22] In the event that this Recommended Order be adopted by the Board, the word "ordered" shall be deemed substituted for the word "recommended."

ployees, by discharging any employee, or in any other manner discriminating in regard to hire or tenure of employment, or any term or condition of employment.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, including the above-named labor organization, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement authorized by Section 8(a)(3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer to Horace Limbaugh, Henry Lewis, Elton Cathey, William Clem, Joe Shamblin, Gordon Hodgkins and W. T. Willingham immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority and other rights and privileges.

(b) Make whole Horace Limbaugh, Henry Lewis, Elton Cathey, William Clem, Joe Shamblin, Gordon Hodgkins and W. T. Willingham for any loss of pay they may have suffered by reason of the discrimination against them, by payment to each of them of a sum of money equal to the amount he normally would have earned as wages from the date of his discharge to the date of Respondent's offer of reinstatement in the manner set forth in the section entitled "The remedy."

(c) Preserve and make available to the Board and its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records relevant or necessary to the determination of backpay due and to the reinstatement and related rights provided under the terms of this Recommended Order.

(d) Post at all its terminals copies of the notice attached

hereto and marked Appendix.[23] Copies of said notice, to be furnished by the Regional Director for the Twenty-third Region, shall, after being signed by Respondent's Representative, be posted by Respondent immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Twenty-third Region, in writing, within 20 days from the date of this Recommended Order, what steps the Respondent has taken to comply herewith.[24]

It is recommended that the complaint be dismissed insofar as it alleges discrimination against Hall Nichols.

Dated at Washington, D. C. Mar 5 1963

HORACE A. RUCKEL,
Trial Examiner.

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[23] In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "A RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[24] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

Appendix

Notice to All Employees

Pursuant to
The Recommended Order of a Trial Examiner

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will offer Horace Limbaugh, Henry Lewis, Elton Cathey, William Clem, Joe Shamblin, Gordon Hodgkins and W. T. Willingham immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other employment rights and privileges; and make them whole for any loss of pay they may have suffered by reason of the discrimination against them.

We Will make whole Horace Limbaugh, Henry Lewis, Elton Cathey, William Clem, Joe Shamblin, Gordon Hodgkins and W. T. Willingham by paying to each a sum of money equal to each such employee's loss of pay suffered as a result of the Respondent's discrimination against each employee.

We Will Not discourage membership in or activities on behalf of General Drivers, Warehousemen and Helpers Local Union No. 968; Dallas General Drivers, Warehousemen and Helpers Local Union No. 745; Truck Drivers and Helpers Local No. 568, All Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization of our employees, by discharging, or otherwise discriminating in regard to the hire and tenure of any employee's employment or any term or condition of employment.

We Will Not in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named labor organiza-

tions, or any other labor organization, to bargain collectively through representatives of their own choosing and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities.

All our employees are free to become and remain, or to refrain from becoming or remaining members of, any labor organization except to the extent that such right may be affected by an agreement authorized by Section 8(a)(3) of the Act as modified by the Labor Management Reporting and Disclosure Act of 1959.

RED BALL MOTOR FREIGHT, INC.
(Employer)

Dated By
(Representative) (Title)

NOTE:—We will notify any of the above-named employees presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 6617 Federal Office Building, 515 Rusk Avenue, Houston 2, Texas (Tel. No. Capitol 8-0611, Ext. 296), if they have any question concerning this notice or compliance with its provisions.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 23-CA-1435

RED BALL MOTOR FREIGHT, INC.,

and

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 968; DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 745; TRUCK DRIVERS AND HELPERS LOCAL UNION NO. 568, ALL AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.

DECISION AND ORDER

On March 5, 1963, Trial Examiner Horace A. Ruckel issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. He also found that the Respondent had not engaged in certain other alleged unfair labor practices and recommended dismissal of these allegations of the complaint. Thereafter, the Respondent and the General Counsel filed exceptions to the Intermediate Report and supporting briefs.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and

hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

143 NLRB No. 32

ORDER

The Board adopts as its Order the "Recommended Order" of the Trial Examiner.

Dated, Washington, D.C., Jun. 26, 1963.

FRANK W. McCULLOCH,
Chairman,

PHILIP RAY RODGERS,
Member,

JOHN H. FANNING,
Member,
National Labor Relations Board.

(SEAL)

Filed March 3, 1964. Nathan J. Paulson, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1963.

No. 17,956

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 968; DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 745; TRUCK DRIVERS AND HELPERS, LOCAL UNION NO. 568, ALL AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*,

RED BALL MOTOR FREIGHT, INC., *Intervenor*.

No. 17,994

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

RED BALL MOTOR FREIGHT, INC., *Respondent*.

On Petition for Review, and on Cross-Petition for Enforcement, of an Order of the National Labor Relations Board.

Before: Wilbur K. Miller, Wright and McGowan, Circuit Judges.

JUDGMENT

These cases came on to be heard on the record from the National Labor Relations Board, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged

by this court that the decision and order of the National Labor Relations Board on review herein are affirmed.

Pursuant to Rule 38(b) the National Labor Relations Board shall within 10 days hereof serve and file a proposed enforcement decree consistent with the judgment of this court.

Per Curiam.

Dated: March 3, 1964.

(1270-8)

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 141

RED BALL MOTOR FREIGHT, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* order of the court of appeals (Pet. App. 41-42) is not officially reported. The Board's decision and order (Pet. App. 1-40) are reported at 143 NLRB No. 32.

JURISDICTION

The judgment of the court of appeals (Pet. App. 41-42) was entered on March 3, 1964. The petition

for a writ of certiorari was filed on June 1, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the Company discriminatorily discharged seven if its employees, thereby violating Sections 8(a)(3) and (1) of the Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in the petition (Pet. 2-3).

STATEMENT

A. THE BOARD'S FINDINGS AND CONCLUSIONS

The Company is a Delaware corporation which operates as a common carrier of freight by motor vehicle in the southern and southwestern portions of the United States (Pet. App. 3). The Teamsters Union [1] has been attempting to organize the Company's drivers for many years, and the Company has strongly opposed these efforts. See *Red Arrow Freight Lines, Inc., et al*, 77 NLRB 859, enforced, 180 F. 2d 585 (C.A. 5), certiorari denied, 340 U.S. 823 (*ibid.*).

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[1] General Drivers, Warehousemen and Helpers Local Union 968 *et al.* (hereinafter the Teamsters).

The proceeding here is concerned only with employees at the Company's Dallas, Houston, and Shreveport terminals.

In early 1961, the Teamsters revived its campaign, and it was again opposed by the Company which favored the incumbent Union of Transportation Employees (U.T.E.) (Pet. App. 3-4; J.A. 335-341).[2] In November 1961, the Board conducted an election and the U.T.E. won and was recertified. On and after March 27, 1962, the Company discharged Horace Limbaugh, and six other leading Teamsters adherents. The Board found that these discharges were discriminatory, in violation of Sections 8(a)(3) and (1) of the Act. The facts as to each discharge are as follows:

1. HORACE LIMBAUGH

During 1961, Limbaugh was active on behalf of the Teamsters, signing up more than 50 drivers and serving as an observer at the Board election. His union activities were well known to his superiors, for he had been singled out by them for interrogation concerning his union sympathies and had affirmed to them his support of the Teamsters (Pet. App. 16; J.A. 36-37).

Several months after the election, Limbaugh was involved in a minor accident; he backed his truck into a bicycle which was hidden from his view. The total damage amounted to about $8 (Pet. App. 16; J.A. 40). When he reported the accident, he was told by Terminal Manager Lane that he was being suspended pending investigation. Limbaugh protested that he

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[2] "J.A." references are to the Joint Appendix printed for use in the court below, and filed with the petition.

could not afford a lengthy suspension because of pressing financial obligations and asked permission to work elsewhere during his suspension. Although Lane was aware that the suspension would probably not extend more than 24 hours and that Limbaugh would be paid in full while suspended, he did not tell this to Limbaugh but merely remarked that the length of Limbaugh's suspension was "up to the general office" and that it was "impossible under the Company's policy" for him to work elsewhere while under suspension (Pet. App. 16-17; J.A. 42-43, 183-184, 189, 192-193). By the following day, Lane had decided to return Limbaugh to duty immediately (Pet. App. 17; J.A. 195). Nevertheless, when he heard Limbaugh express fear that the Company was "out to get him" for his union activities, he suggested that Limbaugh resign and typed out a letter of resignation, which he urged Limbaugh to sign when the latter hesitated because of the loss of his seniority (Pet. App. 17; J.A. 43, 196).

The Board found that "Lane's entire course of action was calculated to bring about Limbaugh's quitting," that by so doing the Company constructively discharged him, and that the reason for the discharge was his union activities (Pet. App. 17-18).

2. HENRY LEWIS

Throughout 1961, Lewis was active on behalf of the Teamsters (Pet. App. 26; J.A. 82). In May 1961, he improperly parked a trailer, and, although it was not damaged and the Company incurred no expense,

Lewis was placed on probation with a warning that "any further act of negligence or indication of poor judgment on your part will result in your immediate dismissal" (Pet. App. 26; J.A. 83-84, 102-103). In January 1962, Lewis was severely criticized for "failing to use good judgment" in not picking up a shipment of school supplies he saw at Paris, Texas, notwithstanding that he had been instructed by the dock foreman there not to do so because another driver was scheduled to call for it (Pet. App. 26-27; J.A. 88-90).[3] Terminal Manager Lane forced Lewis, under threat of discharge, to sign a statement which contained an "admission" of poor judgment (Pet. App. 27; J.A. 90-91, 353). Two months later, Lewis claimed a $1.88 extra tonnage fee for helping to load and unload a shipment of paper.[4] The Company investigated the claim and asserted to Lewis that it had evidence, in the form of a letter from the shipper, proving that the claim was dishonest, and discharged him. It did not, however, show this letter to Lewis and it did not produce the letter at the Board hearing (Pet. App. 28; J.A. 83, 95-100, 105-106, 323-324, 361).

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[3] Company rules forbid a pickup without such authorization (J.A. 88).

[4] According to Lewis' uncontradicted testimony, after he and two other men had placed half the load in the truck, it was seen that the entire load would not fit unless the truck was repacked in another way. The three men therefore unloaded the truck and a forklift was used to repack it (Pet. App. 27; J.A. 96).

The Board found that the Company discharged Lewis because of his union activity, using the allegedly false tonnage claim as a pretext to hide its real motive (Pet. App. 28-29).

3. ELTON CATHEY

Cathey was active in the Teamsters organizing drive in 1961, signing up about 75 employees (Pet. App. 18; J.A. 53, 55-56). His activities on behalf of the Teamsters were well known to the Company (J.A. 61-62). At night, on April 1, 1962, about 70-75 miles past Shreveport, Arkansas, two outer wheels on a tractor being driven by Cathey suddenly came off, one of which rolled off the highway into a parked car, damaging it in the amount of $600 (Pet. 18; J.A. 63-66). An inspection revealed that the wheels had come off because the ten studs which protrude from the brake drum hub and which hold the inner wheel to the axle had sheared off (J.A. 65-66). On April 5, after having been dispatched on two further runs, Cathey was summoned to Safety Director Barr's office (Pet. App. 19; J.A. 70-71). Barr showed Cathey a bulletin issued to drivers and said that it required drivers to check their wheels and lugs every 75 miles. Cathey, after reading the bulletin, denied that it mentioned lugs (Pet. App. 19; J.A. 71-72).[5] Barr asked Cathey how long he had driven his rig on April 1 without checking it, and Cathey replied that he had

[5] The bulletin is entitled "Tire Fires" and deals solely with their prevention and with methods of fighting them, specifically by keeping tires properly inflated, and asks drivers to check their tires every 50 to 75 miles (J.A. 353-354).

made his last check at Shreveport, which was less than 75 miles from the scene of the accident. (Pet. App. 19; J.A. 72). Barr nevertheless requested Cathey to resign, and, when the latter refused, discharged him (Pet. App. 19; J.A. 72). Barr indicated that he had made up his mind before speaking to Cathey (Pet. App. 19-20; J.A. 70-74).

The Board—finding that Cathey had in fact complied with the Company's rules before the accident, that he had no reason to believe the truck was in any way defective, that he had so informed Barr, and that Barr had decided upon a penalty even before talking to him about the accident—concluded that Cathey was discharged because of his union activity and not for his alleged failure to check his equipment (Pet. App. 21-22).

4. WILLIAM CLEM

Clem was an active Teamsters supporter who served as an observer at the Board election on November 30, 1961 (Pet. App. 29; J.A. 107). In January 1962, Maintenance Supervisor Odum criticized Clem for spreading rumors, and the next month he tried to get Clem to transfer to Denver where the Teamsters already had a contract (Pet. App. 30; J.A. 111-112, 113-115). In April, Odum told Clem and five other trailer shop employees that they were being laid off. One laid-off employee brought up the question of bumping rights, and Clem said the others had a right to bump but that he did not because he was not a member of U.T.E. Although Odum knew

that Clem was in error and could have bumped to another job without any loss in pay, he kept quiet (Pet. App. 30-31; J.A. 115-116, 308-309).

The Board concluded that Odum deliberately failed to advise Clem of his job retention rights, even though he knew that Clem was mistaken about them, because he desired to terminate Clem on account of his union activity (Pet. App. 31-32).

5. JOE SHAMBLIN

Shamblin was expelled from the U.T.E. on October 15, 1961, and thereafter campaigned actively for the Teamsters, becoming a steward, and serving as an observer at the November 30 election (Pet. App. 22; J.A. 123, 125). On March 28, 1962, Vice President Fisk accused Shamblin of "Teamster trouble-making business" and suggested that he quit (Pet. App. 22-23; J.A. 126-127). On April 6, Terminal Manager Lane also suggested that Shamblin quit, when Shamblin charged that the Company's principal owner, Henry English, was "part of a false union" (Pet. App. 23; J.A. 127-132).

On April 25, 1962, shortly after being assigned to an LTL ("less than truck") run, Shamblin noticed that a shipment being loaded on his truck at the Western Electric Company warehouse was 15 cartons short. He pointed this out to the Western Electric employees. They denied that the shipment was short and suggested that, as the warehouse was about to close for the day, Shamblin return the following morning to straighten the matter out. He agreed

since the suggestion accorded with Company policy. Early the next day, the missing shipment was found in the Western Electric warehouse, and Shamblin picked it up (Pet. App. 23; J.A. 134-137, 148).

Five days later, Terminal Manager Lane criticized Shamblin for mishandling the Western Electric shipment. Lane accused him of being a troublemaker, again invited him to resign, and warned him that a similar mistake would cost him his job (Pet. App. 24; J.A. 139-140). That same day, Shamblin mistakenly failed to pick up six pieces of equipment at White's Auto, in a shipment comprising 300 to 400 such pieces. The following day, Lane discharged him (Pet. App. 24; J.A. 138, 141-143). In neither case did the Company suffer any financial loss. In addition, Lane testified that Shamblin was the only driver he fired for failure to pick up merchandise, despite the fact that the Company received 40 to 50 reports daily concerning shipment shortages, many of which were due to failure to pick up shipments (J.A. 120, 200).

The Board—finding that the Company's complaint over the Western Electric incident "approache[d] the trivial" and that the White incident was "of little higher stature"—concluded that the Company discharged Shamblin for his activity in behalf of the Teamsters (Pet. App. 24-25).

6. GORDON HODGKINS AND W. T. WILLINGHAM

Both Hodgkins and Willingham were active Teamsters adherents and served as observers at the November 30, 1961, election (Pet. App. 10, 12; J.A. 8-9, 155). Safety Director Barr discharged Hodgkins on

May 3, 1962, and Willingham on May 9, 1962, each allegedly for going five miles over the posted speed limits.[6]

As to Hodgkins, on the night of May 3, he was dispatched out of turn (Pet. App. 10-11; J.A. 159-160). Barr, along with Lane who had never before accompanied him, set up a radar trap in Corsicana, Texas, on Hodgkins' route to Dallas. After catching Hodgkins speeding, they reminded him of the need for regularly checking his tires but said nothing to him about observing the speed limit (Pet. App. 11; J.A. 160-162, 282-283). They returned to Dallas without checking any other drivers, although they were aware that several other Red Ball trucks were due to pass through Corsicana that night (Pet. App. 11; J.A. 285). When Hodgkins arrived at Dallas that evening, Barr told him that he had been checked doing 35 miles per hour in a 30-mile zone and that he was discharged (Pet. App. 11; J.A. 162-163).

As to Willingham, on the afternoon on May 9, Barr waited 1½ hours at the Houston dock until Willingham had loaded his truck and then followed him for almost two hours throughout the streets of Houston. When Willingham returned to the terminal, Barr summoned him to the terminal manager's office, told him that he was observed going 45 miles per hour in a 40-mile zone and then going through a stop light, and had him discharged (Pet. App. 12-13; J.A. 275-276, 293).

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[6] The Company has no set penalty for speeding (Pet. App. 7-8; J.A. 284-285).

Barr's usual practice was to spend a maximum of 30 minutes to an hour checking one truck (J.A. 275). Hodgkins and Willingham were the only drivers of the hundreds in the Company's employ discharged for traffic violations from July 1961 to May 1962 (J.A. 271). Moreover, Barr, contrary to his usual practice, discharged both men without checking into their work records, both of which were good (Pet. App. 11, 13; J.A. 166, 285). In these circumstances and in view of the evidence of union activity, the Board concluded that Hodgkins and Willingham were not discharged for speeding violations, but because of their activities in behalf of the Teamsters (Pet. App. 13-15).

B. THE BOARD'S ORDER

The Board ordered the Company to cease and desist from the unfair labor practices found, and from in any other manner interfering with the employees' organizational rights. The Board also ordered the Company to reinstate with back pay the seven employees discriminated against, and to post the usual notices (Pet. App. 34-36).

C. THE COURT OF APPEALS DECISION

The court of appeals entered a brief *per curiam* order, stating "that the decision and order of the National Labor Relations Board on review herein are affirmed" (Pet. App. 42).

ARGUMENT

The sole question presented is whether, as the court below concluded, there is substantial evidence to

support the Board's findings that seven of petitioner's employees were discharged because of their activities on behalf of the Teamsters, rather than for the reasons assigned by the Company. An evidentiary issue of this kind does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

There is no merit to petitioner's contention (Pet. 7-14) that the court below misapplied the substantial evidence standard of review by sustaining a blanket finding of discrimination which rests on nothing more than the employer's anti-union attitude and fails to take into account the good cause which existed for the discharges. The Trial Examiner's report (Pet. App. 1-38), which was adopted by the Board, shows that each discharge was individually considered and the reasons advanced by the Company to explain it were fully evaluated. The Board, as in the typical Section 8(a)(3) case, found each discharge to be discriminatory only after weighing the evidence showing an anti-union motive for the action against that showing legitimate reasons therefor, and concluding that the former was stronger.[7] Since, on the basis of the

[7] The Company's statement (Pet. 4) that the Board found that the Teamsters organization effort extended continuously from 1948 to 1961 is incorrect. The Board stated (Pet. App. 3) that such activity was "revived" in late 1960, thereby recognizing that it had been suspended earlier. Equally without substance is the claim (Pet. 4-7) that the Board's "Background" findings (Pet. App. 3-5) were the basis for the findings of discriminatory discharge. It is clear that the "Background" was used by the Board merely to shed light on the subsequent events, all of which were treated in full and on their own merits.

facts summarized above, the Board's conclusion in each instance was reasonable, the court below adhered to, rather than departed from, the principles of *Universal Camera, supra*, in permitting the Board's findings to stand.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 141

RED BALL MOTOR FREIGHT, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

Petitioner replies to the brief of respondent in opposition to the Petition for Writ of Certiorari as follows:

I. The Brief of the Board Fails to Show That the District of Columbia Circuit Applied the Substantial Evidence Test of the First and Fifth Circuits.

The Brief in Opposition to the Petition for a Writ of Certiorari points up clearly the unfair and intolerable position to which Petitioner has been relegated in this proceeding from its very inception. The Brief of the National Labor Relations Board does nothing more than

recite that seven employees were engaged in an effort to organize Petitioner on behalf of the Teamsters' Union and that these seven (among the many other employees who likewise sponsored and adhered to the Teamsters' Union) were discharged. It brushes aside the facts showing infractions of safety and other rules by the discharged employees in order to arrive at the conclusion that the discharges were based upon union activity. The Brief of the Board is wholly devoid of any citation to any substantial evidence which will sustain this conclusion. It has nothing to say of any effort by Petitioner to threaten or coerce its employees or of any unlawful activities engaged in by Petitioner during the election. A few references are made to statements made by officers of Petitioner but these fall short of sustaining the ultimate finding made by the Board regarding the discharges.

The evidence upon which the Board relies to show that the discharges in this case were for reasons other than just cause pales into insignificance when compared to the statements and activities of the employers in the cases cited in Petitioner's brief, which statements and actions were held by the First and Fifth Circuits not to constitute sufficient evidence to hold the company liable for the discharges it made. (See *N.L.R.B.* v. *Whitelight Products Division*, 298 F. 2d 12 (1 Cir., 1962), *cert. denied* 369 U.S. 887; *N.L.R.B.* v. *Whitin Machine Works*, 204 F. 2d 883 (1 Cir., 1953); *N.L.R.B.* v. *Atlanta Coca-Cola Bottling Co.*, 296 F. 2d 896 (5 Cir., 1961), and other cases cited in Petitioner's brief to this Court.)

II. The Facts in the Record Clearly Show, Under Principles Applied in Other Circuits, That All the Discharges Were Made With Sufficient and Just Cause.

The Board's Brief attempts to paint a picture of minor infractions committed by the seven employees which were seized upon by the Petitioner in order to carry out some unproved plan or concerted effort of discharging these particular seven men. However, a look at the facts show that there is no proof whatever that such was the case.

1. *Horace Limbaugh*

The Board's brief fails to state that prior to the backing accident for which he was discharged Horace Limbaugh was involved in five backing accidents between 1958 and March of 1962. Likewise, the acceptance by the Examiner of Limbaugh's suppositions regarding his discharge is clearly against all logic. Limbaugh, so he stated, felt that he was being discriminated against because Charles Fisk, a company Vice President, was after him and because he was not told how long he would be suspended pending a decision on the charge made against him. This was pure conjecture on Limbaugh's part and in no way proves that he was fired for Teamster activity. Also, Terminal Manager Lane advised him that he could check at the general offices to determine how long he would be suspended pending the investigation (J.A. 42-43) and he further asked him to report to him the next morning (J.A. 194, 661). Limbaugh did neither.

2. *Henry Lewis*

Henry Lewis was obtaining signatures from employees to support the Teamsters' Union. There is no evidence whatever in the record to show that the company was

aware of this activity. There *is* evidence, however, that he dropped tractor trailers on December 3, 1960, in Greenville, Texas; six days later in Tyler, Texas; and on February 6, 1961, in Clarksville, Texas. On February 11, 1961, he was told to improve his work. However, on April 26, 1961, he again did the same thing and was placed on probation for one year. While on this probation he committed the offense for which he was finally discharged.

3. *Elton Cathey*

To sustain a finding of unlawful discharge with respect to Cathey, the Examiner and the Board relied on the erroneous factual assumption that Cathey had acted as an observer for the Teamsters. The fact is that Cathey was not an observer, and the stipulation at J.A. 5-6 so shows. Aside from this gross error, which should vitiate any further findings made regarding Cathey's discharge, there is no mention in the Board's brief that Cathey told one Rex M. Murphy, a Red Ball mechanic, at the scene of the accident for which he was discharged that he expected he would be fired for not checking his equipment (J.A. 213). Nor is there any discussion concerning the great amount of evidence presented by the company as to the knowledge that Cathey should have had regarding the condition of the wheel which ultimately was thrown from his truck.

4. *William Clem*

William Clem was laid off in April, 1962, as were several others in the trailer shop for economic reasons (J.A. 415). However, Clem was offered a job by Harold Odum, Red Ball's maintenance supervisor, in the Denver terminal at higher pay, which he declined to take. Clem was also advised by Odum, as a member of a group, that any of the employees were at liberty to exercise their seniority to

bump and obtain a job which they had the seniority to obtain and the qualifications to hold. (J.A. 308). Clem was discharged for valid economic reasons and could have obtained a position with Red Ball in Denver had he so desired.

5. *Joe Shamblin*

Joe Shamblin was discharged for negligence in his job. There was much testimony regarding Shamblin's attitude toward the company and errors made by him, but the most important ones, which were not explained in the Board's brief, were that Shamblin made disparaging remarks about the company and its policies, that he was involved in an accident on April 6, 1962, and warned about both it and his attitude toward the company, and that on April 25, 1962, he signed for freight when he knew he had not picked it up. (J.A. 134, 135). On May 1, 1962, he failed to pick up six tires and a sign, but signed that he *had* received them. Also Shamblin had been warned three times in 1958 about failing to check freight and was given a letter of warning by the company on April 8, 1958.

Further, the record does not support the statement in the Board's brief that 40 to 50 reports daily were made concerning shipment shortages. These 40 to 50 reports would include shortages delivered to consignees, which would also include shortages properly noted and properly handled with no employee negligence (J.A. 198).

6. *Gordon Hodgkins and W. T. Willingham*

Gordon Hodgkins had been warned about speeding on July 17, 1961, by Safety Director Barr. On April 24 or 25, 1962, a safety meeting was held in Dallas by Barr at which safety was stressed because of an increase in accidents in March of 1962. (J.A. 127). On May 3, 1962, at night, Barr set up a radar in Corsicana, Texas, to check

Red Ball equipment operating between Houston and Dallas. Hodgkins was observed exceeding the speed limit by five miles per hour and was discharged. From these facts the Board found that there was discrimination against him.

W. T. Willingham was given a written warning in March of 1962 for exceeding the 10 miles per hour speed limit on Red Ball's property. Two other men also received such notices. On May 9, 1962, Barr observed Willingham's truck at City Dock No. 18 and followed it, observing it exceed the speed limit by five miles per hour and go through a red light. He was discharged. The Board's brief also fails to mention that during the hearing, Willingham denied having received any violation notices (when he had) and also denied being the same W. T. Willingham who was convicted of a felony. (The Board never brought forth any evidence that Willingham was not the same man who was convicted of a felony although counsel for the General Counsel was granted time within which to do so.)

The foregoing facts, under the cases as decided in the other Courts of Appeals, clearly preclude and render erroneous the findings made by the Board in this proceeding. Surely Petitioner was not obliged to show that these employees were *not* active in the union. All that it was required to do was to show that they *were* guilty of violating the company's rules and that the discharges were based upon these violations (or upon economic necessity). To fault the company for having discharged these men and to make it prove that it did not discharge them other than for cause places an insuperable obstacle in Petitioner's path and violates due process. The facts show what transpired. By conjecture and illogical reasoning based upon no substantial evidence in the record as a whole the

Board found the discharges were illegal. Such a finding should be reversed in keeping with the practice of the other Courts of Appeals.

Conclusion

All the foregoing shows clearly that, under the principles applied in other circuits, there was no substantial evidence on the whole record to sustain the findings made by the Examiner and the Board. Decisions under the National Labor Relations Act should not depend upon who wins the race to the courthouse.

It is respectfully submitted that this Court should grant the Petition for Certiorari to rectify the errors made below and to insure fair and uniform enforcement of the National Labor Relations Act.

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